93-580

No. _____

Supreme Court, U.S.
FILED
OCT 12 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

GARY D. LEWIS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

Petition For A Writ Of Certiorari To The Ohio Court Of Appeals For Allen County, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

RICHARD KAMMEN
McCLURE, McCLURE & KAMMEN
235 North Delaware
Indianapolis, Indiana 46204
(317) 236-0400
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution prohibit the Ohio practice of alleging a criminal accusation in multiple pleadings which state an offense in alternative forms, thus failing to set forth with reasonable certainty the nature of the offense, thereby denying the defendant the opportunity to prepare a defense.

2. Whether the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution prohibit the Ohio practice of judging constitutional claims of vagueness in criminal accusations under an abuse of discretion standard.

PARTIES TO THE ACTION

The names of all parties to the action in the lower court appear in the caption to this case.

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PETITION FOR WRIT OF CERTIORARI

The petitioner Gary D. Lewis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ohio Court of Appeals for Allen County, Third Appellate District, entered in the above-entitled proceeding on January 7, 1993.

I. OPINIONS OF OTHER COURTS

On January 24, 1992, a jury verdict was returned against Mr. Lewis finding him guilty of theft by deception in excess of one hundred thousand dollars. Mr. Lewis was sentenced on March 23, 1992, by the Honorable Michael

A. Rumer, Judge of the Common Pleas Court of Allen County, Ohio. App. 31.

On January 7, 1993, the Ohio Court of Appeals, Allen County, Third Appellate District, affirmed Mr. Lewis' conviction. *State v. Lewis*, 85 Ohio App.3d 29, ___ N.E.2d ___ (1993 WL 262750, 1993). App. 1. On June 2, 1993, the Ohio Supreme Court denied without opinion Mr. Lewis' motion for leave to appeal. App. 15. On July 14, 1993, the Ohio Supreme Court denied without opinion Mr. Lewis' petition for rehearing. App. 16.

II. JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals of Ohio, Third Appellate District was entered on January 7, 1993, affirming petitioner's conviction dated March 23, 1992. On June 2, 1993, the Ohio Supreme Court denied petitioner's leave to appeal. Thereafter, on July 14, 1993, the Ohio Supreme Court denied a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

III. CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

A. CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

AMENDMENT V

AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

AMENDMENT VI – JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION . . .

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the law of the State wherein they reside. No State shall make or enforce any

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. STATE STATUTORY PROVISIONS WHICH THE CASE INVOLVES

R.C. § 2913.01(A) Definitions [Deception]

(A) "Deception" means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

R.C. § 2913.02 Theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent:

(3) By deception;

(4) By threat. . . .

R.C. § 2941.05 Statement Charging an Offense

In an indictment or information charging an offense, each count shall contain, and is sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Su h statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the section of the Revised Code describing the offense or declaring the matter charged to be public offense, or in any words sufficient to give the accused notice of the offense of which he is charged.

R.C. § 2941.07 Bill of Particulars

Upon written request of the defendant made not later than five days prior to the date set for trial, or upon order of the court, the prosecuting attorney shall furnish a bill of particulars setting up specifically the nature of the offense charged and the conduct of the defendant which is alleged to constitute the offense.

C. UNITED STATES CODE

28 U.S.C. § 1257. **State Courts; certiorari**

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under the United States.

IV. STATEMENT OF THE CASE

An Allen County Ohio Grand Jury returned an indictment against Petitioner Gary D. Lewis. T.d. 0001. The indictment charged Mr. Lewis with one count of aggravated theft in violation of R.C. § 2913.02, one count of securing writings by deception in violation of R.C. § 2913.43, and one count of grand theft in violation of R.C. § 2913.02.[1] T.d. 0001.

On August 19, 1991, Mr. Lewis filed a Motion For Bill Of Particulars.[2] T.d. 0025. Mr. Lewis was provided a Bill

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[1] As to Count I, the indictment read as follows (omitting the dates and formal parts):

> GARY D. LEWIS . . . did with purpose to deprive the owner, to-wit: Frances M. Shepherd of property, to-wit: money in that he did knowingly obtain or exert control over said property without the consent of Frances M. Shepherd and/or beyond the scope of the express or implied consent of Frances M. Shepherd and/or by deception. The said Gary D. Lewis having committed more than one theft offense during the given span of time in the same capacity or relationship with Frances M. Shepherd, to-wit: employee and/or friend and/or lover. The aggregate value of all property in all the theft offenses being in excess of One Hundred Thousand ($100,000.00) Dollars. . . .

[2] The motion requested, *inter alia*, a specific and particular statement of how Mr. Lewis exerted control over Ms. Shepherd's property without her consent, beyond the scope of her

Of Particulars on September 19, 1991.[3] T.d. 0042. On October 23, 1991, Mr. Lewis filed his Motion To Dismiss The Indictment Or For Alternative Relief.[4] T.d. 0064. In

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express or implied consent, or by deception; of the dates and amounts of each alleged theft; and how and when Mr. Lewis was an employee and/or friend and/or lover.

[3] The Bill stated in part:

> Count One of the Indictment sets forth a Theft Offense in excess of One Hundred Thousand Dollars ($100,000) and is plead (sic) in the alternative. Either Gary D. Lewis did without the consent of Frances M. Shepherd or beyond the scope of expressed or complied consent of Frances M. Shepherd, or by deception of Frances M. Shepherd, exert control over money and that the Defendant, Gary D. Lewis, committed more than one theft offense during the given span of time in the same capacity or relationship with Frances M. Shepherd, to wit: employee and/or friend and/or lover. The Defendant, Gary D. Lewis, on several occasions, told more than one individual that he was employed by Frances M. Shepherd and the monies that he received was (sic) for that employment. On other occasions, he indicated to individuals that the money he received from her was a gift. . . . With regard to the issue of Gary D. Lewis being an employee and/or friend and/or lover, the State would again reiterate that the Defendant, Gary D. Lewis, had indicated to other witnesses he was an employee of Frances M. Shepherd, a friend or lover. . . .

[4] The Motion stated, *inter alia*:

> 1. The indictment, taken with the bill of particulars is unlawfully vague.
>
> * * *
>
> 3. The indictment, taken with the bill of particulars is duplicitous.
>
> * * *

response to Mr. Lewis' motion, the State provided an Amended Bill Of Particulars.[5] T.d. 0074. On December 4, 1991, the trial court sustained Mr. Lewis' Motion of October 23, 1991, holding that Count I of the indictment was unconstitutionally vague. The court allowed the State to attempt to cure this deficiency by providing more detailed information as to Count I by a second amended bill of particulars.[6] T.d. 0086. On December 16, 1991, Mr.

> 9. That, without a delineation as to which transaction specifically is illegal, and specifically why the transaction is illegal, the charges are unlawfully vague and the defendant cannot prepare for trial. For example, unless the State of Ohio were to specifically state that check number X was obtained by deception as opposed to beyond the consent of Frances Shepherd, there is no way to prepare for trial.

[5] The Amended Bill Of Particulars stated in part:

COUNT I: From on or about January 11, 1982 to on or about December 5, 1989, at 1962 West Market Street, Allen County, Lima, Ohio, the defendant did with purpose to deprive the owner, Frances M. Shepherd of property, to wit: money, knowingly obtained or exerted control over said money by deception to wit: a) induced gifts based on false indications of affection and/or on false promises to take care of the victim, and/or b) induced gifts based on false statements of need, and/or c) secured payment for services not rendered by others, and/or d) secured payment for services not rendered by himself, and/or e) deposited victim's monies into his own accounts without authority of the victim, and/or f) by other means. The defendant committed more than one theft offense during the alleged time period in the same capacity of relationship to the victim, Frances Shepherd, to wit: employee and/or friend and/or lover. . . .

[6] The entry provided in part:

> Conversely, due to the vagueness of the pleadings the defendant cannot know what conduct the State claims

Lewis was provided with the State's Second Amended Bill Of Particulars Count I.[7] T.d. 0105. On December 20, 1991, Mr. Lewis filed his Objection To State Of Ohio's Second Amended Bill Of Particulars/Renewed Motion To

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> to be unlawful prior to May 22, 1985 or challenge the value of property allegedly stolen. In both events, defendant is being denied due process of law by thwarting his ability to properly prepare a defense to Count 1. *State v. Lawrinson* (1990), 49 O.S.3d 238, [551 N.E.2d 1261]; *State v. Sellards* (1985), 17 O.S.3d 169, [478 N.E.2d 781].
>
> The proper remedy at this juncture is not dismissal of Count 1. The proper remedy is for the State to specify the date of each theft offense it alleges occurred, the capacity of the accused at the time of the alleged occurrence, and the conduct on each date which constituted the alleged offense. This can be accomplished by filing a second amended bill of particulars as to Count 1 only. The same shall be filed and served on or before December 16, 1991. The motion is further taken under advisement pending such filing.

[7] Prior to a listing of one hundred, ninety-one (191) checks allegedly negotiated or received by Mr. Lewis, was the following allegation:

> On or about January 11, 1982, through December 19, 1989, at 1962 West Market Street, Allen County, Lima, Ohio, Gary D. Lewis did, with purpose to deprive the owner, to wit: Frances Shepherd, of property, to wit: money, knowingly obtained or exerted control over said money by deception. The said Gary D. Lewis having committed more than one theft offense involving the following listed monies during the alleged time period in the same capacity of relationship with Frances Shepherd, to wit: friend, the aggregate value of all property in all the theft offenses being in excess of One Hundred Thousand Dollars ($100,000). . . .

Dismiss Count I.[8] T.d. 0119. On December 30, 1991, Mr. Lewis' Objection/Motion was overruled. T.d. 0131.

Thus, Mr. Lewis proceeded to trial by jury, still unaware of the exact nature of the charge against him or the State's theory of guilt. Count I of the original indictment was originally phrased in the alternative, alleging

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[8] The Objection/Motion stated in part:

> The second amended bill of particulars does not list the specific conduct which constitutes the alleged offense as ordered by the court. It does allege deception, however the defendant and the Court are still forced to speculate as to the state's theory of prosecution. . . . The purpose of Rule 7 (E) of the Ohio Rules of Criminal Procedure is to provide the defendant with this information so that he may properly prepare for trial. The State of Ohio has failed to comply with the requirements of Rule 7(E) as well as the court's order of December 4, 1991. . . .
>
> * * *
>
> The indictment, taken with the Bills of Particulars leaves the defendant with no way to properly prepare a defense. . . . Such freedom to change theories or identities of crimes alleged throughout the prosecution violates the defendant's rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America and Article One section 10 of the Constitution of the State of Ohio.
>
> Finally, the defendant submits that there is no way for the court to guarantee that the jury has reached a unanimous verdict. Some may find guilt on one theory, some another. Some may find the defendant acted in one capacity, some another. In short, the present posture of the case, leaves both defendant and the court in a procedural nightmare which is unfair to both.

violations of R.C. § 2913.02(A)(1), (A)(2), and (A)(3) each of which contemplates distinct theories of guilt. As amended by way of bill of particulars, the indictment alleged "deception," a term having several alternative, mutually exclusive meanings under Ohio law. The indictment alleged conduct supposedly occurring in various ways over a period of eight years.

At trial the prosecutor advanced many alternative theories of guilt.[9] Mr. Lewis objected, arguing that the bills of particulars did not clarify the State's theory or the nature of the charges against him, and further, that the State's theories were not within the indictment or the bills of particulars.

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[9] In his opening statement, the prosecutor described the deception as "a money laundering scheme." T.p. 421 (Vol. 3). The scheme involved receiving money from friends and relatives who received money without working for it. T.p. 421 (Vol. 3). Later, the prosecutor refers to "a new scheme of deception" where Mr. Lewis endorses Ms. Shepherd's checks and deposits them in his account. T.p. 422 (Vol. 3).

During closing argument, the prosecutor claimed the deception was that Ms. Shepherd believed Mr. Lewis was performing work for her for free, but Mr. Lewis was charging her for the work through friends. T.p. 1705 (Vol. 9). Next, the deception is Mr. Lewis telling Ms. Shepherd that people from New Jersey were going to beat her up, people were on her roof, Fran and Bob Johns were trying to kill her, and drug dealers wanted to steal from her. T.p. 1710-1711 (Vol. 9). Next, the deception is that Mr. Lewis loved Ms. Shepherd and would care for her. T.p. 1714 (Vol. 9). Finally, in the prosecutor's rebuttal, the deception is providing unneeded services, t.p. 1750 (Vol. 9), convincing Ms. Shepherd the Lima Police can't help her, t.p. 1753 (Vol. 9), and promises of love and care. T.p. 1754 (Vol. 9).

Counts II and III were dismissed at the close of the State's case. The jury returned a general verdict of guilty as to theft by deception on Count I. At sentencing and post trial, the trial court, addressing the issue of sufficiency of the evidence, advanced a new theory of guilt stating:

> The Court finds, based on the evidence, that the deception occurred by playing directly on and exacerbating Mrs. Shepherd's paranoia of her niece and others to obtain money.
>
> It is uncontroverted in this case that the defendant claimed to be providing surveillance and/or security assistance to Mrs. Shepherd. The deception, in this Court's opinion, lies in the fact that the defendant fostered the belief with Mrs. Shepherd that such assistance was necessary.

App. 24-25.

On direct appeal, Mr. Lewis argued that he did not "foster" such a belief in Ms. Shepherd, as it was also "uncontroverted" that Ms. Shepherd's paranoia of her niece and belief that surveillance and/or security was necessary was longstanding. Again, the State of Ohio offered new and alternative theories of guilt.[10] Changing

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[10] The State argued that the deception was based upon a) induced gifts based on false indications of affection and/or on false promises to take care of the victim; b) induced gifts based on false statements of need; c) secured payment for services not rendered by others; d) secured payment for services not rendered by himself; and e) deposited victim's monies into his own accounts without authority of the victim.

once again the theory supporting guilt, the Ohio Court of Appeals held that:

> By such action and omission, reasonable minds could conclude that appellant was confirming and/or perpetuating a false impression of Shepherd's [that "people from New Jersey" were on Shepherd's roof making noises and trying to scare her], which is deception, pursuant to R.C. 2913.01(A).

App. 8-9. Further, the Court of Appeals added a new form of deception purportedly supporting the conviction:

> Secondly, evidence was presented that there were checks made out to Shepherd, signed by her, and then endorsed by appellant and deposited into his own account, without Shepherd's knowledge. By such action, reasonable minds could conclude that appellant was withholding information from Shepherd, which again is deception, pursuant to R.C. 2913.01(A).

App. 9.

The Court of Appeals held that as the bill of particulars "clarified" the method of theft by alleging theft by "deception" as that term is defined by Ohio statutes, the trial court did not abuse its discretion by overruling Mr. Lewis' motion to dismiss. The court rejected Mr. Lewis' constitutional claim that because the statutory definition of deception contemplated several alternative, distinct and in some cases mutually exclusive theories of prosecution the indictment as "clarified" was still unconstitutionally vague. The Ohio Court of Appeals held that a review of Mr. Lewis' constitutional claim was limited to a

consideration under an abuse of discretion standard. App. 5.

Mr. Lewis now requests that this Court grant him the considered review to which he was entitled, but denied, by the Ohio Appellate Courts.

A. HOW THE FEDERAL QUESTION WAS PRESENTED

Mr. Lewis first raised the application of the Federal Constitution prior to trial in his Objection To State Of Ohio's Second Amended Bill of Particulars/Renewed Motion To Dismiss Count I on December 20, 1991. The trial court denied the motion without comment on the Federal Constitutional Issue, stating: "Based upon consideration of the [Motions to Dismiss] the Court finds said motions not well taken and therefore overruled." T.d. 0131; App. 33. Periodic objections were made and rejected during trial and after trial. Mr. Lewis maintained his Federal Constitutional Question on direct appeal. Mr. Lewis' conviction was affirmed, again without comment on the Federal Constitutional Issue. Finally, Petitioner raised the Federal Constitutional Question in his Petition for Leave to Appeal to the Ohio Supreme Court. The Court denied without opinion Mr. Lewis' petition and request for rehearing.

V. REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the decisions of the Ohio Courts are such a severe departure from this Court's precedent in *Russell v. United States*, 369, U.S.

749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) that this Court should correct the rejection or misinterpretation of that doctrine by the Ohio courts. The rejection by the Ohio courts of the *Russell* doctrine allows situations such as Petitioners' where the conviction rests upon charges which did not specifically inform him of the nature and cause of the accusation as mandated by the United States Constitution, Amendments V, VI and XIV.

Because Ohio law is inconsistent in its application of the function of the indictment and a corresponding bill of particulars, criminal defendants in Ohio are particularly at risk of being forced to trial upon vague charges. Ohio law generally holds an indictment is sufficient if it describes a public offense and it may be in the words of the section of the Revised Code describing the offense. R.C. § 2941.05. As is demonstrated, *infra*, an indictment may therefore be "sufficient," under Ohio law yet constitutionally deficient. In such a case, a line of Ohio cases holds that an accused has a right to a Bill of Particulars "setting up specifically the nature of the offense charged and the conduct of the defendant which is alleged to constitute the offense." R.C. § 2941.07. *State v. Sellards*, 17 Ohio St.3d 169, 478 N.E.2d 781 (1985); *State v. Fowler*, 174 Ohio St. 362, 189 N.E.2d 133 (1984); *State v. Gingell*, 7 Ohio App.3d 364, 455 N.E.2d 1066 (1982); *State v. Dinsio*, 4 Ohio App.2d 309, 212 N.E.2d 606 (1964).

However, Ohio cases hold also that a bill of particulars may not be used to cure "fundamental defects" in an indictment. *State v. Gingell, supra*. The result of these contradictory doctrines is that in Ohio, there exists no requirement that the description of the offense provided

by bill of particulars comport to the constitutional mandates of the Sixth Amendment. In short, Ohio decisions and procedural rules do not require compliance with the Sixth Amendment's requirement that the accused "be informed of the nature and cause of the accusation" as required by *Russell, supra*. Further, by using an abuse of discretion standard of review, constitutional claims of vagueness are not appropriately considered by the Ohio courts.

A. THE OHIO COURT OF APPEALS APPLIED AN IMPROPER STANDARD OF REVIEW IN REVIEWING MR. LEWIS' CONSTITUTIONAL CLAIM

Where the indictment is "legally sufficient" in describing the elements of a given offense, yet constitutionally insufficient in that the charge is "so general in nature that the accused is not given a fair and reasonable opportunity to prepare his defense," a bill of particulars may provide the necessary details of the offense. *State v. Ensman*, 77 Ohio App.3d 701, 603 N.E.2d 303 (1991). *See also State v. Gingell*, 7 Ohio App.3d 364, 367, 455 N.E.2d 1066, 1070-1071 (1982) and cases cited therein. It is thus apparent that in Ohio, an indictment may be "legally sufficient" while at the same time constitutionally deficient. Theoretically, a bill of particulars may cure this constitutional deficiency.

Yet in the same breath, Ohio cases hold that a bill of particulars may not be used to cure "fundamental defects" in an indictment. *State v. Gingell, supra*. Further, whether or not the bill of particulars serves its purported

purpose of providing the constitutionally required detail to a criminal charge is left to the sound discretion of the trial judge. *State v. Gingell, supra; State v. Clay,* 29 Ohio App.2d 206, 280 N.E.2d 385 (1972). Clearly, whether or not a bill of particulars remedies the constitutional defects in an indictment cannot be left solely to the discretion of the trial court, to be reviewed only for an abuse of discretion.

In *Schad v. Arizona,* ___ U.S. ___, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), this Court recognized that "it is an assumption of our system of criminal justice so rooted in the traditions and conscience of our people as to be *ranked as fundamental* [citation] that no person may be punished criminally save upon proof of some *specific* illegal conduct. *Id.*, 111 S.Ct. at 2497 (emphasis supplied) (citation and quotation marks omitted). "[O]ur vagueness cases support the notion that a requirement of proof of specific illegal conduct is fundamental to our system of criminal justice. . . . " *Id.*, 111 S.Ct. at 2498, fn. 4. *See also Sheppard v. Rees,* 909 F.2d 1234 (9th Cir. 1989) (Fundamental error that accused not informed of nature of accusation prior to trial, not subject to harmless error review).

Here, the trial court specifically found that the indictment, supplemented by both the first and amended bills of particulars was constitutionally deficient in apprising Mr. Lewis of the nature of the charge against him. As such, the final bill of particulars was constitutionally mandated to insure Mr. Lewis' fundamental rights. This clearly removed any discretion that the trial court purportedly had to order the final bill of particulars. However, the second amended bill of particulars was less informative than the first two inasmuch as it alleged only

"deception" which under Ohio law is an intentionally vague term. The United States Constitution deprived the trial court of the discretion to deny Mr. Lewis' request to be informed of the nature of the charges against him. The Ohio Court of Appeals was required to give deference to the Constitution rather than review the trial court's decision under only an abuse of discretion standard of review. *Schad v. Arizona, supra.*

Because of the low threshold necessary to satisfy an abuse of discretion standard, in Ohio, Federal Constitutional claims of vagueness are not given the searching scrutiny required by this Court and the Constitution.

B. BY MERELY ALLEGING THEFT BY "DECEPTION," THE STATE OF OHIO FAILED TO PROVIDE MR. LEWIS OF THE NATURE OF THE ACCUSATION AGAINST HIM

The Ohio Court of Appeals incorrectly held that "[t]he bill of particulars clarified the mode by which appellant allegedly deprived Shepherd of her money; namely, by deception." App. 6. In fact, alleging deception, especially as that term is defined by Ohio, does not clarify the accusation at all.

Ohio defines "deception" as:

> knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, *or by any other conduct, act, or omission* that creates, confirms, or perpetuates a false impression in another, including a false impression as to law,

> value, state of mind, or other objective or subjective fact.

R.C. § 2913.01(A) (emphasis supplied). In the Committee Comment to H11, the Committee specifically explained its intention to encompass an unlimited and unspecified range of conduct in defining deception:

> The definition of "deception" adopts a broad concept of deceit, framed in terms not only of acts or omissions but also of results. The essence of deception is an act or omission which the actor is consciously aware creates or perpetuates a false impression in another. If the act involved is a representation, it need not be totally false – it may merely be misleading. In addition, the acts of withholding, or preventing another from getting information are specifically included in the definition. Thus, a person need not actually make a representation to practice deception. It is enough if he merely prevents another, by whatever means, from learning the true facts, and thereby knowingly deceives him.

In the comments on Ohio's theft statute, R.C. § 2913.02, the Committee noted:

> This section covers a plethora of former offenses of which the gist was larceny, embezzlement, conversion, fraud, or false pretense. . . . This section also includes theft by deception, formerly the subject of section 2907.21, larceny by trick, as well as a long list of former statutes of which some variety of fraud or false pretense was an element.

Thus it is clear that by design, the word "deception" is a broad, generic term, encompassing a multitude of acts,

formerly prohibited by a long list of more specific statutes.

Over thirty years ago, this Court condemned the practice of charging a defendant in generic terms in *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), holding:

> It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, – it must descend to particulars. [citation]. An indictment not framed to apprise the defendant with reasonable certainty, of the nature of the accusation against him is defective, although it may follow the language of the statute. [citation]. In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. [citation]. Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. [citations]. . . .
>
> [The omission of specific facts and circumstances] is thus the violation of the basic principle that the accused must be apprised by the indictment with reasonable certainty, of the

> nature of the accusation against him. [citation]. A cryptic form of indictment . . . requires the defendant to go to trial with the chief issue undefined. . . .

Id. at 765-766, 82 S.Ct. at 1047-1048 (internal citations, quotations, and ellipses omitted). *See also United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (indictment must provide notice of charges to be defended against); *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978) (indictment must allege offense with accuracy to enable defendant to plead former jeopardy). Here, the Ohio Courts have completely ignored this mandate.

The fact that the term deception fails to apprise a defendant of the nature of the charge against him is most notably demonstrated by the State of Ohio's various different arguments advancing Mr. Lewis' guilt. The State of Ohio argued at different times, that the evidence was sufficient to support the conviction based upon many separate and distinct, and in some cases mutually exclusive, theories of deception. *See* fn. 9 and fn. 10, *supra*. Different theories of guilt were advanced at the end of trial than those advanced at the beginning. Yet other theories were advanced on appeal. The trial and appellate courts affirmed based upon yet other theories of guilt.

In *Russell*, this Court condemned the exact practice used to convict Mr. Lewis. Using defendant Price's conviction as an example, the Court held:

> Price was put to trial and convicted upon an indictment which did not even purport to inform him in any way of the identity of the topic under subcommittee inquiry. At every

> stage of the ensuing criminal proceeding Price was met with a different theory, or by no theory at all, as to what the topic had been. Far from informing Price of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large – to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal.

Russell at 768, 82 S.Ct. at 1049.

For example, the State's initial theory was that Mr. Lewis obtained money illegally by charging Frances Shepherd for services not rendered. Petitioner defended against the State's accusation by demonstrating that he had provided services for Ms. Shepherd, and that Ms. Shepherd did indeed desire for him to have the money he had received from her. The State of Ohio then "shifted its theory of criminality" claiming that the deception was *not* in securing payment for services not rendered, but rather deceiving Ms. Shepherd into believing these services were necessary, a form of deception never alleged at any point prior to trial.

An accusation which allows a prosecution to shift its theory of guilt mid or post trial is directly prohibited by the Sixth Amendment to the United States Constitution and this Court's precedent in *Russell, supra*. This Court should grant Mr. Lewis' writ on his behalf and on the behalf of others similarly situated, and declare the current Ohio practice unconstitutional.

VI. CONCLUSION

WHEREFORE; petitioner Gary D. Lewis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ohio Court of Appeal for Allen County, Third Appellate District, entered in the above-entitled proceeding on January 7, 1993.

Respectfully submitted,

RICHARD KAMMEN
McCLURE, McCLURE & KAMMEN
235 North Delaware
Indianapolis, Indiana 46204
(317) 236-0400
Counsel of Record for
Gary D. Lewis

No. _____

In The

Supreme Court of the United States

October Term, 1993

GARY D. LEWIS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

Petition For A Writ Of Certiorari
To The Ohio Court Of Appeals For Allen County,
Third Appellate District

APPENDIX

COURT OF APPEALS
ALLEN COUNTY, OHIO
THIRD APPELLATE DISTRICT

STATE OF OHIO

PLAINTIFF-APPELLEE CASE NO. 1-92-42

v.

GARY D. LEWIS OPINION

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: January 7, 1993

ATTORNEYS:

MESSRS. MCCLURE, MCCLURE & KAMMEN
Mr. Richard Kammen
Indiana Bar No. 5064-49
Attorney at Law
235 N. Delaware
Indianapolis, IN 46204
For Appellant

MS. CATHERINE D. GOLDMAN
Reg. No. 0008454
Special Prosecutor
1080 Springbrook Dr.
Mansfield, OH 44906
For Appellee

HADLEY, P.J. Defendant-Appellant, Gary D. Lewis, appeals from a judgment entry of conviction filed in the Allen County Court of Common Pleas, after a jury returned a verdict finding appellant guilty of aggravated theft, pursuant to R.C. 2913.02.

The testimony at trial elicited the following facts. Frances Shepherd ("Shepherd") became acquainted with appellant sometime prior to 1982 after appellant, in his capacity as a City of Lima police officer, responded to Shepherd's phone calls to check on her house[1]. After appellant began responding to Shepherd's phone calls, he began doing security work for Shepherd, checking on the "prowlers" when not on duty. Also, Shepherd owned numerous rental properties in Lima and Kenton, which Lewis assisted her in repairing.

During the time period beginning in 1982 through 1989, the prosecution produced checks which Shepherd wrote to appellant, a friend of appellant who was also a Lima police office – Tim Brandehoff ("Brandehoff"), Brandehoff's wife, and appellant's brother – Larry Lewis. The prosecution also produced checks which were made out to Shepherd, signed by her, and then endorsed by appellant. All of these checks amounted to over two hundred thousand dollars. Testimony indicated that the majority of the amount of checks Shepherd wrote to persons other than appellant, actually went to appellant. Appellant's theory of defense was that he received the money in

---

[1] Shepherd claimed that there were "people from New Jersey" on her roof that kept making noises. She called the Lima Police Department numerous times beginning sometime in the 1960's complaining of prowlers on her rooftop.

return for the security work and repair work he did on the rental properties, and also as gifts. Shepherd's testimony indicated that she intended and wanted to give appellant this money. She also indicated that she did not want her niece, receive any of this money.

On January 2, 1990, Shepherd was found by appellant and her niece's husband, in her home where she had fallen. Upon finding her, the niece was informed by her husband that Shepherd's home was dirty and unkempt. The niece went over to Shepherd's home during Shepherd's stay in the hospital and discovered one or more of the checks written to appellant. On January 3, 1990, Shepherd appointed appellant as her attorney in fact and signed a new will, leaving everything to appellant. Thereafter, an investigation by the Lima Police Department was initiated, culminating in a three count grand jury indictment being returned against appellant in May 1991.

On August 19, 1991, appellant moved for a bill of particulars, to which appellee responded appropriately. Appellant then moved to dismiss the indictment. Appellee filed an amended bill of particulars. Thereafter, on December 5, 1991, the trial court found that count one should not be dismissed but

> *** * * for the State to specify the date of each theft offense it alleges occurred, the capacity of the accused at the time of the alleged occurrence, and the conduct on each date which constituted the alleged offense.**

Subsequently, appellee filed a second amended bill of particulars, which stated:

* * *

> **On or about January 11, 1982, through December 19, 1989, at 1962 West Market Street, Allen County, Lima, Ohio, Gary D. Lewis did, with purpose to deprive the owner, to wit: Frances Shepherd, of property, to wit: money, knowingly obtained or exerted control over said money by deception. The said Gary D. Lewis having committed more than one theft offense involving the following listed monies during the alleged time period in the same capacity of relationship with Frances Shepherd, to wit: friend, the aggregate value of all property in all the theft offenses being in excess of One Hundred Thousand Dollars ($100,000): * * ***

Appellant objected to this bill of particulars and renewed its motion to dismiss count one of the indictment. However, the trial court found that this bill of particulars was sufficient.

Appellant was originally indicted on three counts. Counts two and three were dismissed at the close of the prosecution's case-in chief. Upon completion of all the evidence, the jury returned a verdict finding appellant guilty on count one of the indictment, aggravated theft. It is from this judgment entry of conviction that appellant asserts four assignments of error.

Assignment of Error No. 1

The trial court erred in overruling defendant/appellant Gary Lewis' objection to State of Ohio's second amended bill of particulars/renewed motion to dismiss Count I as the state had failed to set forth the specific 'nature and cause of the accusation' as provided by Section 10, Article I of the Ohio Constitution and the Sixth Amendment to the United States Constitution.

Appellant's first assignment of error argues that the second amended bill of particulars filed by the prosecution does not provide him with sufficient specificity as to the nature and cause of the charges alleged in the indictment. We first note that appellant's assignment attacks only the bill of particulars, and not the indictment. Therefore, any discussion by appellant that the indictment did not plead an element is not relevant. A bill of particulars cannot cure defects in an indictment. *State v. Gingell* (1982), 7 Ohio App.3d 364. Rather, the purpose of the bill of particulars is merely to provide *greater detail* to the accused of the nature and cause of the charge against him, not to provide missing pieces in the indictment. *Id.*

Whether or not the bill of particulars provides greater detail to the charge contained in the indictment is a matter left to the sound discretion of the trial judge. *State v. Clay* (1972), 29 Ohio App.2d 206. Therefore, our determination is limited to whether the trial court abused its discretion in overruling appellant's objection/renewed motion to the prosecution's second amended bill of particulars. An abuse of discretion is more than an error of law or judgment; " * * * it implies that the court's attitude

is unreasonable, arbitrary or unconscionable." *Tinkham v. Groveport-Madison Local School District* (1991), 77 Ohio App.3d 242, 250.

Based upon a review of the indictment and the second amended bill of particulars, we find that the trial court did not abuse its discretion in overruling appellant's objection/renewed motion to the prosecution's second amended bill of particulars. The bill of particulars clarified the mode by which appellant allegedly deprived Shepherd of her money; namely, by deception. Also, it defined the precise relationship alleged between appellant and Shepherd; namely, that appellant deceived Shepherd in his capacity as a friend. Furthermore, the second amended bill of particulars listed each check, the date it was written, to whom it was written, and the amount of each check that the prosecution alleged was involved in the bringing of the charges against appellant.

The indictment differed from the bill of particulars, in that it alleged theft, pursuant to R.C. 2913.02(A), by possibly any of the four ways to commit theft[2]. Also, it stated that the alleged theft was committed in appellant's capacity as employee, friend and/or lover. Finally, no checks or information contained in such checks were made part of the indictment. Therefore, based upon the additional information contained in the bill of particulars and the narrowing of the precise allegations against appellant, we find that the trial court did not abuse its discretion in overruling appellant's objection/renewed

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[2] R.C. 2913.02 states that theft can be committed by failing to have consent of the owner over the owner's property, by exceeding one's scope of authority, by deception, or by threat.

motion to the prosecution second amended bill or particulars.

Assignment of Error No. 2

The trial court erred in denying defendant/appellant Gary Lewis' motion for acquittal as to Count I at the close of the state's case and again at the close of all the evidence because there was no evidence to prove beyond a reasonable doubt that Mr. Lewis was guilty of theft by deception[.]

It is well-established by Ohio law that a court will not grant a motion for acquittal, pursuant to Crim.R. 29(A), when the evidence presented is such that reasonable minds could reach different conclusions as to whether each material element of the crime had been proven beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. In reviewing the trial court's ruling on this motion, we must view the evidence in a light most favorable to the state. *State v. Wolfe* (1988) 51 Ohio App.3d 215.

Therefore, to determine whether there was sufficient evidence presented on each material element of the crime for which appellant was found guilty, we must review the elements of aggravated theft. R.C. 2913.02 states, in pertinent part:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

* * *

(3) By deception;

* * *

"Deception" as defined in R.C. 2913.01, as applied to R.C. 2913.02, states, in pertinent part:

> **(A) 'Deception' means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission which creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.**

Based upon a review of the record, we find that the trial court properly denied appellant's motion for acquittal at the close of the state's case-in-chief and the close of all the evidence. Appellant argues in his brief that the element upon which the state provided no evidence was that of deception, and thus, his motion for acquittal should have been granted. As appellant has chosen to address this element only, we also will address only this element.

First, there was evidence presented at trial that Shepherd thought "people from New Jersey" were on her roof making noises and trying to scare her. There was no evidence that anyone was ever on her roof. There is also evidence that appellant would threaten these people, scare them away, and watch her roof from a distance to check on the people from New Jersey. By such action and omission, reasonable minds could conclude that appellant was confirming and/or perpetuating a false impression

of Shepherd's, which is deception, pursuant to R.C. 2913.01(A).

Secondly, evidence was presented that there were checks made out to Shepherd, and signed by her, and then endorsed by appellant and deposited into his own account, without Shepherd's knowledge. By such action, reasonable minds could conclude that appellant was withholding information from Shepherd, which again is deception, pursuant to R.C. 2913.01(A).

Appellant argues that this case is similar to *State v. Baumgarden* (1988), 49 Ohio App.3d 24. We do not agree. In *Baumgarden*, the court of appeals ruled that defendant could not have been convicted of theft by deception because the checks allegedly obtained by defendant by deception were available for his employer's review when the employer's bank would return the canceled checks each month. Herein, appellant argues that he can not be convicted of theft by deception because the checks allegedly obtained by deception were available for Shepherd's review. The matter *sub judice* differs from *Baumgarden*. Herein, there was evidence presented that Shepherd was diagnosed with Alzheimer's in approximately 1983 and also expert testimony that Shepherd was experiencing "dementia senile type", which impairs one's memory in 1990. Based on this difference between *Baumgarden* and the facts herein, we find it likely that reasonable minds could conclude, based upon the competent, credible evidence presented, that appellant had been deceptive with Shepherd.

For the above stated reasons, we find that the trial court did not err in overruling appellant's motion for

acquittal. Therefore, this assignment of error is without merit.

Assignment of Error No. 3

The trial court erred in failing to review the grand jury transcript, in camera and in the presence of counsel, to determine whether inconsistencies or exculpatory statements were contained therein.

Appellant argues that the trial court should have permitted him to review or produce the grand jury testimony of three witnesses; namely, Fran Johns, Larry Lewis, and Leon Campbell.

The availability of grand jury testimony is permitted pursuant to Crim.R. 6(E), but, such availability is limited to circumstances where the defense can demonstrate a "particularized need" for such disclosure. *State v. Greer* (1981), 66 Ohio St.2d 139.

> **2. Grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy. * * ***
>
> **3. Whether particularized need for disclosure of grand jury testimony is shown is a question of fact; but, generally, it is shown where from a consideration of all the surrounding circumstances it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness' trial testimony.**

Id. at paragraph two and three of the syllabus.

Considering a review of appellant's argument and the relevant portions of the trial transcript, we find that appellant did not demonstrate a "particularized need" for disclosure which outweighs the need to preserve the secrecy of the grand jury testimony. We first note that appellant's only reason for requesting the grand jury testimony was that these witnesses were all key state witnesses. However, this does not constitute a "particularized need." Not only has appellant not presented a particularized need for the grand jury transcripts, but also there is no evidence that any of the witnesses he requested grand jury transcripts on presented any "surprise" evidence nor did any of them become contradictory with appellant's counsel during trial over the relevant allegations in issue.

Moreover, we do not agree with appellant's assertion that the facts in this matter are similar to the facts in *Dennis v. United States* (1966), 384 U.S. 855. In *Dennis*, there was a considerable amount of time that elapsed not only between the events alleged in the indictment, but also between the time of the grand jury proceedings and the trial. Herein, less than a year elapsed between the grand jury proceedings and the time of the trial. The charge could not have been proven without the witnesses whose grand jury testimony was sought in *Dennis;* whereas, herein, there was corroboration of the relevant matter testified to by the three witnesses whose grand jury testimony was sought. Finally, the testimony of the witnesses in *Dennis* was largely uncorroborated. Herein, the three witnesses' testimony was corroborated by other state witnesses.

Because appellant failed to show a particularized need to review the grand jury testimony of the three witnesses, this assignment of error is without merit.

Assignment of Error No. 4

The trial court erred in overruling defendant/appellant Gary Lewis' motion for a change of venue and motion for a new trial based upon the denial of a change of venue as Mr. Lewis demonstrated that he would not and did not receive a trial before a fair and impartial jury.

Appellant argues that there was not a fair and impartial jury determining the outcome of his trial based upon the pretrial publicity. Crim.R. 18(B) permits a court to transfer any action before it outside the county in which the trial is to be held when the trial court believes that the defendant cannot receive a fair and impartial trial. Whether or not venue should be transferred is a matter left to the sound discretion of the trial court. *State v. Maurer* (1984), 15 Ohio St.3d 239. An appellate court should not disturb the trial court's ruling on this matter " ' * * * unless it is clearly shown that the trial had abused its discretion. * * * ' " *Id.* at 250.

> **It has long been the rule in Ohio that '[t]he examination of jurors on their *voir dire* affords the best test as to whether prejudice exists in the community against the defendant, and where it appears that opinions as to the guilt of the defendant of those called for examination for jurors are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue, in**

> **absence of a clear showing of an abuse of discretion.' [Citation omitted.]**

Id. at 250-251. We have reviewed the record of the *voir dire* examination of the prospective jurors in this case and conclude that the trial court did not abuse its discretion in overruling appellant's motion for a change of venue.

First, the record indicates that the jurors felt that despite their exposure to the media accounts regarding appellant's case, if any, they could be fair and impartial and listen to all of the evidence before making a decision. Secondly, we find important, as did the Ohio Supreme Court in *Maurer, supra,* and this court in *State v. Booher* (1988), 54 Ohio App.3d 1, that appellant failed to utilize all of his peremptory challenges that were available to him. Appellant argues that he was choosing between the "lesser of two evils" in not exercising his remaining peremptory challenges. It cannot be predicted who would have become jurors if appellant had exercised all of his peremptory challenges', what the outcome would have been if the prosecution exercised its remaining peremptory challenge, if at all; or, whether any peremptory challenges would have been utilized with an alternate juror(s). Therefore, as this court noted in *Booher,* appellant must have been satisfied with the jury as seated if he failed to exhaust all of his peremptory challenges.

This assignment of error is overruled.

Judgment affirmed.

EVANS and BRYANT, JJ., concur.

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

ALLEN COUNTY

STATE OF OHIO PLAINTIFF-APPELLEE v. GARY D. LEWIS DEFENDANT-APPELLANT	:	CASE NO. 1-92-42 JOURNAL ENTRY

For the reasons stated in the opinion of this Court rendered herein on January 7, 1993, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the Court of Common Pleas of Allen County is affirmed at the costs of the appellant for which judgment is rendered.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge.

/s/ Ronald E. Hadley
/s/ John R. Evans
/s/ Illegible
JUDGES

DATED: January 7, 1993

THE SUPREME COURT OF OHIO

1993 TERM

To wit: June 2, 1993

State of Ohio,	:	
Appellee,	:	Case No. 93-447
v.	:	ENTRY
Gary Lewis,	:	
Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Allen County, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Richard Kammen.

(Court of Appeals No. 19242)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1993 TERM

To wit: July 14, 1993

State of Ohio, Appellee,	:	Case No. 93-447
v.	:	REHEARING ENTRY
Gary Lewis, Appellant.	:	(Allen County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 19242)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEAS,
ALLEN COUNTY, OHIO

STATE OF OHIO
Plaintiff

-vs-

GARY D. LEWIS
Defendant

CASE NO.
CR91 05 0190

JUDGMENT ENTRY OF CONVICTION

INDICTMENT FOR:

COUNT 1 - AGGRAVATED THEFT, felony 2, R.C. 2913.02;
COUNT 2 - SECURING WRITINGS BY DECEPTION, felony 4, R.C. 2913.43;
COUNT 3 - GRAND THEFT, felony 4, R.C. 2913.02;

This 30th day of May, 1991, Defendant personally present in open Court unrepresented by counsel; State of Ohio represented by John W. Allen, Special Prosecuting Attorney. Defendant acknowledged service of a copy of the indictment; waived the reading thereof; waived any statutory waiting period and tendered a plea of NOT GUILTY to the charges contained in the indictment.

This 13th day of January, 1992, defendant personally present in open Court with Attorneys Richard Kammen and Richard T. Reese; State of Ohio represented by Special Prosecuting Attorney John W. Allen and Assistant Prosecuting Attorney Cathy Goldman. Thereupon came

the following named persons who were duly impaneled and sworn, to-wit:

Pansy Gales	Charles F. Barga
Rohonda K. Redmond	Mary L. Weber
Robert O. Stoody	Sue K. Bowman
Larry M. Huber	Christina K. Lause
Julie M. Lee	Susan M. Middlemiss
Sondra J. Heidlebaugh	Kathleen S. Croy

ALTERNATES: Daniel E. Spicer
James F. Carmichael

Court recessed until the following day.

This 15th day of January, 1992, Court reconvened as the trial was continued on the 14th day of January, 1992 due to a snow and ice storm. The defendant was personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. Opening statement made on behalf of the State of Ohio and on behalf of the defendant. Evidence was presented on behalf of the State of Ohio. Court recessed until the following day.

This 16th day of January, 1992, defendant personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. Evidence continued to be presented on behalf of the State of Ohio. Court recessed until the following day.

This 17th day of January, 1992, defendant personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. Evidence continued to be presented on behalf of the State of Ohio. Court recessed

for the day and advised the jury to next appear on Tuesday, January 21, 1992.

This 21st day of January, 1992, defendant personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. Evidence continued to be presented on behalf of the State of Ohio. Court recessed until the following day.

This 22nd day of January, 1992, defendant personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. Evidence continued to be presented on behalf of the State of Ohio. The State of Ohio then rested its case. Whereupon, counsel for the defendant moved the Court for a verdict of acquittal as to all three counts contained in the indictment. The Court sustained the Motion for a Directed Verdict of Acquittal as to Counts Two and Three contained in the indictment, and overruled the Motion for a Directed Verdict of Acquittal as to Count One contained in the indictment. Evidence was presented on behalf of the defendant as to Count One. Court recessed until the following day.

This 23rd day of January, 1992, defendant personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. Evidence continued to be presented on behalf of the defendant. The defense then rested its case. The Motion for a Directed Verdict of Acquittal as to Count One was renewed by Mr. Kammen, Attorney for the defendant, and the same was taken under advisement by the Court. Final arguments were

presented by the State of Ohio and the defense. Whereupon, the Court charged the jury, and the jury retired for deliberation purposes. The Court, after being advised by the jury they would like to recess for the day, granted that request and Court recessed for the day. The jury was sequestered as a body under the direction and control of the Bailiff.

This 24th day of January, 1992, the jury commenced with their deliberations. The defendant was personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman.

Whereupon, on this 24th day of January, 1992, came the said jury, conducted into open Court by the bailiff. The defendant was personally present in open Court with counsel, Richard Kammen and Richard T. Reese; State of Ohio represented by John W. Allen and Cathy Goldman. The said jury returned its verdict, signed by all twelve jurors, to-wit:

> "We, the jury in this case, duly impaneled and sworn and affirmed, find the defendant, GARY D. LEWIS, GUILTY of theft by deception.
>
> DATED: January 24, 1992.
>
> We, the jury in this case, further find that the value of the property involved was MORE than $100,000.00.
>
> DATED: January 24, 1992."

At the request of defense counsel the jury was polled as to their verdict in open Court. The jury was then released from any admonitions previously given by the

Court and were discharged from further jury service in this matter.

The Court ordered a Pre-sentence Investigation Report be conducted by the Adult Parole Authority. The matter of sentencing is hereby continued to Monday, March 23, 1992 at 9:00 A.M. Bond is continued.

/s/ Michael A. Rumer
MICHAEL A. RUMER,
JUDGE

cc: Prosecuting Attorney
Richard Kammen
Richard Reese
Adult Parole Authority

IN THE COURT OF COMMON PLEAS
ALLEN COUNTY, OHIO

STATE OF OHIO PLAINTIFF	CASE NO. CR91 05 0190
-VS-	MEMORANDUM DECISION ON
GARY D. LEWIS DEFENDANT	SENTENCING

This matter is before the Court for sentencing of the defendant who has been found guilty of aggravated theft after a jury trial. This case has challenged the Court to review its own philosophy of sentencing in light of factual matters which the Court concludes are unique to its experience and the Court suspects, in the experiences of many other trial judges.

In preparing for the sentencing the Court has reviewed all of its trial notes to refresh its memory relative to the evidence presented. The Court has also again reviewed the defendant's testimony presented to the grand jury on May 21, 1991 and unsealed and presented to the Court as evidence at a motion to suppress on January 9, 1992. In addition, the Court has reviewed the exhibits admitted into evidence during the trial.

As has been noted in the record a pre-sentence investigation was ordered, received and extensively reviewed by the Court. Pursuant to R.C. 2951.03 the Court obtained a forensic evaluation of the defendant for assistance in assessing appropriate mitigating factors, both past and present. The Court has also read and, accepted the comments to the degree appropriate, the numerous letters

supplied the Court by defense counsel from the various friends, family and associates of the defendant.

As per the Court Order of February 13, 1992, each party has submitted its brief and argument relative to restitution. These have been considered and the Court appreciates counsels' assistance.

Finally, the Court has taken into account the arguments of counsel today, the defendant's statement on his own behalf, and the letter defendant forwarded the Court through the U.S. Mail and received March 18, 1992.

All of these matters have been reviewed for the sole and express purpose of determining a just and fair sentence to be imposed upon the defendant under the criteria provided in R.C. 2951.02, both for and against probation and suspension of sentence.

Specifically, the Court finds that in the mid-1970's a relationship developed with Mrs. Shepherd who can best be characterized as a cantankerous, strong-willed elderly lady and the defendant who was a Lima Police Officer who showed concern for her situation. Because the defendant "tolerated" Mrs. Shepherd and her eccentricities better than other officers, the defendant became a "primary" responder to her frequent prowler calls to Lima Police Department. The scenario is corroborated by comments from supervisors and other officers. The defendant commenced doing odd jobs for Mrs. Shepherd such as yard work and home repairs.

As testified to by retired Police Inspector Campbell, there is no prohibition against a Lima Police Department officer doing off duty work of any kind he chooses, as

long as it is not in conflict with police duties. Without directly reflecting on the propriety of police officers using "on duty" contacts to obtain "off duty" work, the lack of a policy in the instant case led to the defendant purportedly providing Mrs. Shepherd privately with services, i.e, watching her house, checking for prowlers, etc., which are police responsibilities if, in actuality, a problem exists. An argument could be made that because of defendant's activity the Lima Police Department was no longer "bothered" by the victim.

During this period the defendant observed what he perceived to be inappropriate police officer conduct including officers soliciting gifts from businesses, officers misreporting theft offenses to permit victims to increase insurance claims, officers concealing personal funds from spouses in divorce actions, and officers routinely working for people who became introduced to the officer through "on duty" activity. The defendant was unsuccessful in his attempt to do anything about these issues from his point of view, but the defendant believes they were real. In this Court's opinion, the defendant perceived this as an institutional attitude and this institutional attitude formed the basis for defendant's belief that his conduct was appropriate. To use a cliche, it became: "no harm, no foul."

By the early 1980's Mrs. Shepherd became more demanding of defendant's time and effort and monetary remuneration increased and became more frequent. The evidence indicates to the Court that defendant commenced his deceptive conduct in his relationship with Mrs. Shepherd at this time. The Court finds, based on the evidence, that the deception occurred by playing directly

on and exacerbating Mrs. Shepherd's paranoia of her niece and others to obtain money.

It is uncontroverted in this case that the defendant claimed to be providing surveillance and/or security assistance to Mrs. Shepherd. The deception, in this Court's opinion, lies in the fact that the defendant fostered the belief with Mrs. Shepherd that such assistance was necessary. The evidence is clear that Mrs. Shepherd had no real need for surveillance and/or security assistance. Defendant perpetuated the belief to the point that Mrs. Shepherd became totally dependent upon him and was calling defendant every day or his designee in defendant's absence several times a week for assistance.

What the Court finds persuasive indicia of defendant's guilty knowledge is the methodology employed by defendant to receive the funds through 1989. The evidence reflects that from 1982 through 1989, $58,000.00 was conveyed to defendant through third persons, i.e. Larry Lewis, James Lewis, Tim Brandehoff and Diane Brandehoff. The total loss claimed for this same period is approximately $210,000.00. Therefore, 28% of the claimed loss passed through third parties. The obvious question is why?

Defendant tenders an explanation through his own statement and by his statements to others that Mrs. Shepherd wanted it this way to avoid her niece learning of the disbursements. Such an explanation lacks foundation since, if the niece were concerned, she would be just as concerned about any unknown person receiving large sums of money without explanation.

In addition, the defendant in his grand jury testimony insists the funds he received, even through third parties, was money he then paid over to others for work the others were performing on Mrs. Shepherd's real estate holdings. This explanation also lacks substance since all of the evidence indicates the defendant is a good, sound businessman in regards to his personal investments and yet all of the alleged transactions with workers were in cash without any receipts or other records. None of Mrs. Shepherd's records indicate such payments to the defendant or third parties, and none of the workers have been identified.

Neither explanation is credible to the Court and both explanations exemplify the enhancement of the deception to reduce potential outside knowledge and interference.

The checks involving third-party payees are substantial beginning in 1984 and are as follows:

YEAR	PAYEE	# CHECKS	AMOUNT
1984	Diane Brandehoff	4	$ 5,233.00
	Tim Brandehoff	2	$ 1,950.00
	James Lewis	1	$ 2,061.00
	Larry Lewis	1	$ 1,068.00
1985	Tim Brandehoff	4	$10,312.00
1986	Tim Brandehoff	3	$14,232.00
1987	Tim Brandehoff	5	$12,466.00
1988	Tim Brandehoff	3	$ 5,000.00
1989	Tim Brandehoff	1	$ 2,000.00
		TOTAL	$54,322.00

The third position presented by defendant as to the money, is in the context of gift. This is an explanation which was tendered but like with the others, is lacking of specifics. Unfortunately, neither counsel inquired of Mrs. Shepherd when deposing her about gifts made to defendant and her method of making the gifts. For this reason the Court finds that the checks issued directly to defendant between 1983 and 1989 in the sum of $81,802.00 may have been gifts in the sense the funds passed from a donor to a donee. Therefore this Court will accept for purposes of this hearing that the funds paid directly in the defendant's name are not subject to recovery through these proceedings.

An analysis of 1987-89 reflects an additional deceptive pattern or scheme to obtain funds by the defendant depositing in his own account checks payable to Frances Shepherd or Wharton. These were endorsed by Frances Shepherd with defendant's co-endorsement. Mrs. Shepherd did testify on this point and specifically denies such a practice and states she would not do business in that manner. These checks are broken down as follows:

YEAR	PAYEE	# CHECKS	AMOUNT
1987	Frances/Wharton	12	$ 4,144.00
1988	Frances/Wharton	66	$27,962.00
1989	Frances/Wharton	34	$15,982.00
	Frances Shepherd	2	$22,253.00
		TOTAL	$70,341.00

These drafts all represent rent, interest, or C.D. funds.

While rarely verbalized, the Court notes that in reviewing the criteria presented in R.C. 2951.02, they are a canonization of how to apply common sense to the sentencing process. In the case at bar, the Court concludes the following:

(1) this defendant did not contemplate that his actions were criminal in nature nor that his conduct would result in harm to Mrs. Shepherd;

(2) that while the aggregate activity of the defendant over a time period of eight years was criminal, such circumstances are unlikely to recur;

(3) the victim of the criminal conduct facilitated the defendant's activity to the degree that she, through her own shrewd and cunning behavior, precipitated a circumstance which enabled the defendant to carry out his criminal activity;

(4) there are substantial grounds tending to excuse the offense even though these grounds are insufficient to establish a defense when the Court considers such factors as the relationship of the defendant to the victim; the unique behavior of the victim with all third parties; and the willingness of the victim, regardless of motive, to disperse funds to the defendant through third parties;

(5) the defendant has no criminal history of any kind and has a 21 year employment record as a police officer, which has been characterized by his past supervisors and peers as dedicated;

(6) the defendant demonstrated his dedication as a family man, whose spouse and children have been and will continue to be supportive of him;

(7) the defendant, the Court is confident, would respond affirmatively to any Court imposed treatment;

(8) the defendant has the ability to make restitution for the loss sustained by Mrs. Shepherd;

(9) penal incarceration, because of defendant's past activity as a police officer, will entail undue hardship and danger to the defendant, which is not outweighed by any need to protect the victim or society as a whole from further criminal conduct by the defendant; and

(10) that the victim's age and emotional dependency upon the defendant is not a factor to be considered against probation in light of all of the surrounding circumstances.

In arriving at these various conclusions and particularly in light of very impressive letters submitted by Jack Griesdorn, Mike DeVita, Mike Keith and Clyde Breitigan I want to reiterate the Court's strong affirmation for the jury system. Each of the officers noted above acknowledge his understanding that the jury has spoken and the jury, not he, heard all the evidence before rendering a verdict. Let there be no mistake about it, our system has its deficiencies, but even with those deficiencies it is the fairest and most just system in the world. It is the system which reiterates that no one, regardless of race,

status, or occupation is above the law and therefore unanwerable [sic] for his or her acts.

It is important that a defendant separate the issue of guilt from the issue of punishment or sentencing. In this case the defendant has failed to accept that the totality of the circumstances dictate a finding that he wrongfully took an elderly lady's money by deceptive means. Until the defendant accepts this activity was wrong by societal standards he will never be able to get his life back together and proceed forward. The Court hopes this can be accomplished by the defendant at this time and he stops blaming others for his circumstance. To approach this problem in any other manner is counter-productive and futile.

Based upon all of the foregoing, the Court orders that the defendant be sentenced to a term of imprisonment of not less than 3 nor more than 15 years at the Ohio Department of Rehabilitation and Corrections; fined the sum of $5,000.00; and, charged the costs of prosecution. The defendant is ordered to make restitution to Frances Shepherd in the sum of $124,663.00.

The term of incarceration shall be suspended and the defendant shall be placed on four (4) years probation with the Adult Parole Authority on the following conditions: (1)that the restitution order be satisfied on or before September 1, 1992; (2)that the fine be paid on or before June 1, 1992; (3)that the court costs be paid on or before May 1, 1992; (4)that the defendant complete 240 hours of community service at a Court approved placement; and (5)that the defendant follow all other terms of probation established by his probation officer.

IN THE COURT OF COMMON PLEAS,
ALLEN COUNTY, OHIO

STATE OF OHIO Plaintiff	CASE NO. CR91 05 0190
-vs-	JUDGMENT ENTRY ON SENTENCING (PROBATION GRANTED)
GARY D. LEWIS Defendant	

This 23rd day of March, 1992, sentencing had with the State represented by the Prosecuting Attorney, and the Defendant represented by Richard Kammen and Richard Reese was brought into open Court in person for the purpose of having the sentence of the law pronounced in accordance with the judgment of conviction entered against the Defendant on January 27, 1992. Thereupon the Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and the Defendant was given an opportunity to present mitigation. Whereupon the Court proceeded, in the presence of the Defendant, to pronounce sentence against him as follows.

It is ORDERED by the Court that the Defendant, GARY D. LEWIS, who has been adjudged to be GUILTY of the offense of:

COUNT 1 - AGGRAVATED THEFT, felony 2, R.C. 2913.02;

be, and hereby is sentenced to confinement in the Ohio Department of Rehabilitations and Corrections for the following terms:

NOT LESS THAN 3 NOR MORE THAN 15 YEARS; FINED THE SUM OF $5,000.00 AND IS

TO PAY RESTITUTION IN THE AMOUNT OF $124,663.00 TO FRANCES SHEPHERD. THE SAID TERM OF CONFINEMENT IS HEREBY SUSPENDED ON THE FOLLOWING CONDITIONS –

State of Ohio to recover from said Defendant all costs of this prosecution, for which execution may issue against the property of said Defendant.

Further, Defendant is placed on probation with the Adult Parole Authority for 4 years on the following conditions:

THE RESTITUTION SHALL BE PAID IN FULL BY SEPTEMBER 1, 1992 AND ALL PAYMENTS TO BE MADE THROUGH THE CLERK OF COURTS OFFICE; THE FINE SHALL BE PAID IN FULL BY JUNE 1, 1992; COMPLETE 240 HOURS OF COMMUNITY SERVICE AT A COURT-APPROVED PLACEMENT; ABIDE BY ALL OTHER TERMS OF PROBATION AS SET BY PROBATION DEPARTMENT. DEFENDANT TO PAY COURT COSTS BY MAY 1, 1992. BOND IS ORDERED DISCHARGED AND APPLIED TO COSTS, FINE AND RESTITUTION.

Further, the defendant was advised of his appellate rights pursuant to Criminal Rule 32 (A)(2). An appeal bond is set in the amount of $10,000.00 cash. Defendant to be released from custody forthwith.

/s/ Michael A. Rumer
MICHAEL A. RUMER,
JUDGE

cc: Prosecuting Attorney
Attorney for Defendant

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

STATE OF OHIO
PLAINTIFF,
-VS-
GARY D. LEWIS
DEFENDANT.

CASE NO.
CR91 05 0190
ORDER

This matter came on to be heard upon defendant's motion to dismiss filed December 11, 1991 (Doc. No. 94), December 17, 1991 (Doc. No. 106 and 107) and December 20, 1991 (Doc. No. 119). Based upon consideration of the same the Court finds said motions not well taken and therefore overruled.

The issues raised by defendant in each of his respective motions cannot be determined by the Court on a pretrial basis. It is alleged by the State in its Second Amended Bill of Particulars that the defendant committed theft by " . . . knowingly obtained or exerted control over said money hy deception . . . " in " . . . the same capacity of (sic) relationship with Francis Shepherd, to wit: friend. . . . " Defendant is not entitled to a dismissal.

IT IS SO ORDERED.

DATED: December 30, 1991

/s/ Michael A. Rumer
MICHAEL A. RUMER,
JUDGE

cc: Prosecuting Attorney
John W. Allen
Richard Kammen
Richard T. Reese